



POLICE DEPARTMENT

August 28, 2018

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2017-17973
Police Officer Charmaine McClain	:	
Tax Registry No. 922738	:	
113 Precinct	:	

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At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer Charmaine McClain, while assigned to the 113th Precinct, on or about November 30, 2016, while on-duty, wrongfully used her personal smartphone. (*As amended*)

P.G. 203-06

PROHIBITED CONDUCT
GENERAL REGULATIONS

2015 Operations Order No. 20,
Page 4, Paragraph 23

Pilot Program - Use of Department
Smartphones and Tablets

2. Said Police Officer Charmaine McClain, while assigned to the 113th Precinct, on or about November 30, 2016, while on-duty, was discourteous to Lieutenant Cornelius O'Keeffe. (*As amended*)

P.G. 203-09 Page 1, Paragraph 2 GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 24 and August 8, 2018. Respondent, through her counsel, entered a plea of Guilty to Specification 1, and Not Guilty to Specification 2. The Department called Sergeant Rochener Gilot and Lieutenant Cornelius O'Keeffe as witnesses. Respondent called Police Officer Cheryl Taylor, and testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. On Specification 1, Respondent, having pleaded guilty, is found guilty as charged. On Specification 2, having reviewed all of the evidence in this matter, I find Respondent not guilty. Recommended penalty for Specification 1: three (3) vacation days.

ANALYSIS

This case involves an accusation that Respondent was discourteous to her platoon commander, Lieutenant Cornelius O'Keeffe, on November 30, 2016 in a Walgreens parking lot on Guy R Brewer Boulevard in Queens. On that date, Respondent and her partner, who were doing a midnight tour, had been reassigned to a post where there would be more enforcement

activity. Lieutenant O'Keeffe directed them to certain Vision Zero locations, under the supervision of Sergeant Rochener Gilot. At approximately 0500 hours, the lieutenant spoke on the phone with the sergeant; Lieutenant O'Keeffe instructed the sergeant to have the officers continue with the enforcement.

When Sergeant Gilot informed Respondent of Lieutenant O'Keeffe's instruction, Respondent voiced some concern about wanting to take her meal, and indicated that she was going to make a complaint. The sergeant communicated Respondent's concern to the lieutenant, who ordered the sergeant to have the officers meet him in the Walgreen's parking lot, a couple of blocks from the precinct. During the conversation that followed, it is alleged (in Specification 2) that Respondent was discourteous to Lieutenant O'Keeffe. It also is alleged (Specification 1) that Respondent wrongfully used her personal cell phone to check Facebook, and then to record her conversation with the lieutenant; Respondent pled guilty to that specification at the outset of the trial.

Lieutenant Cornelius O'Keeffe testified that he learned from Sergeant Gilot that Respondent and her partner, Officer Cheryl Taylor, had requested a post change because they wanted more enforcement activity. He had the sergeant bring them to certain collision-prone locations. After receiving a status update from Sergeant Gilot at approximately 0500 hours, the lieutenant told him to have the officers "stick with it a little longer." Lieutenant O'Keeffe maintained that he was not requiring the officers to write a specific number of summonses. Nevertheless, Sergeant Gilot called him back soon after, and told him that Respondent had threatened to call IAB and her trustee to complain if she missed her meal. The lieutenant was concerned that Respondent was threatening to call IAB for no legitimate reason; he told Sergeant Gilot and the officers to stand by, and drove to meet them in the Walgreens lot, about two blocks from the stationhouse. (Tr. 68-71, 82-83, 90, 103, 105, 107-10)

Upon arrival, Lieutenant O'Keeffe directed Respondent and Officer Taylor to step out of their vehicle and put their hats on. Lieutenant O'Keeffe testified that Respondent placed her hat off-center, slightly to the side. During the ensuing conversation, Respondent was yelling loudly, and gesturing with her hands in a manner that the lieutenant interpreted as "hostile" and "threatening." Lieutenant O'Keeffe testified that he felt that Respondent was behaving in a disrespectful manner, and instructed her to return to the command to receive a command discipline for discourtesy. When he returned to the command, Lieutenant O'Keeffe observed that Respondent was not standing at attention at the desk as he had ordered; instead, she was holding her personal phone in the air playing a recording she had made of their conversation in the Walgreens lot. (Tr. 75-81, 97)

A copy of that recording was introduced into evidence as Dept. Ex. 1. On the recording, Lieutenant O'Keeffe can be heard asking Respondent if she is refusing to write summonses. Before giving her a chance to respond, the lieutenant states that he gave his sergeant instructions to take them out to enforce Vision Zero, and asks Respondent whether she is refusing that order. Respondent answers that she did write summonses, but the lieutenant tells her that he's not done, and that they're still doing enforcement. When he again asks whether she is refusing, Respondent answers, "Did I say I refused?" The lieutenant indicates that the sergeant had told him that she was refusing to write summonses now, and he asks her again if she is refusing: Respondent answers, "No."

[REDACTED]

[REDACTED]

The lieutenant then revisits why Respondent has threatened to call IAB and her trustee, and

[REDACTED]

[REDACTED]

Respondent explains it's because the lieutenant denied them their meal in order for them to write more summonses. Lieutenant O'Keeffe replies that he never denied them their meal, then reminds Respondent that "meal is a privilege." Respondent states that it depends on the needs of the Department, but insists that there is nothing going on. She also notes that she wrote 4 C's (criminal court summonses) and had two collars that month. Respondent questions Lieutenant O'Keeffe about his aggressive behavior, and the lieutenant responds by again accusing Respondent of refusing to write summonses. After Respondent repeats that she never refused, Lieutenant O'Keeffe orders her back to the command to receive a CD for discourtesy. Respondent can then be heard stating, "That's discourtesy? I'm calling IAB for real now. Good. I am."

Sergeant Rochener Gilot of the 113th precinct testified that when Lieutenant O'Keeffe called for an update at about 0500 hours, he told the lieutenant that the officers were doing fine, and each had written three summonses. Lieutenant O'Keeffe told him to have the officers "keep going," so Sergeant Gilot told them that the lieutenant would not let them take meal until they had finished enforcement; neither the lieutenant nor the sergeant ever specified that a certain number of summonses needed to be written. Respondent complained that the time for their meal had passed, and it wasn't fair. She added that if they didn't get their meal, she would notify her trustee or IAB at the end of her tour. Respondent did not, however, say that she was refusing to write summonses. (Tr. 32-34, 39, 49-50, 53-55)

Sergeant Gilot testified that he sent a text to Lieutenant O'Keeffe informing him of what Respondent had said. The lieutenant arranged for the parties to meet in the nearby Walgreens parking lot. When Lieutenant O'Keeffe arrived about a minute after them, he ordered the officers out of their vehicle, and had an "intense conversation" with Respondent. Sergeant Gilot

claimed he could not hear the specific words being said, but described both of them as very loud, and both were gesturing with their hands as they spoke. (Tr. 34-36, 56-58, 63)

Respondent testified that she and her partner did not request a post change for November 30; rather, it was Sergeant Gilot who informed them that Lieutenant O'Keeffe wanted the officers to write summonses for moving violations. Respondent did not object, and wrote summonses as instructed. Around 0400 hours, Respondent asked Sergeant Gilot about taking their meal, but the sergeant said they should keep going until 0500 hours, and then he would check with the lieutenant. An hour later Respondent asked again, and Sergeant Gilot called Lieutenant O'Keeffe. The sergeant informed the officers that the lieutenant wanted them to "stay out there" until they had each written five summonses; up until that point, they each had written three. Respondent testified that the radio was "dead" at that hour, and that there were no radio runs. She informed Sergeant Gilot that she had a migraine and needed to eat, but the sergeant repeated that they needed to stay out there. Respondent wanted to contact her trustee; since she didn't know the trustee's name, she asked her partner and the sergeant for the information. According to Respondent, Sergeant Gilot was sitting in the back texting. The sergeant then told the officers that the lieutenant wanted to meet with them at the Walgreens parking lot. (Tr. 154, 158-63, 172-74)

The officers and Sergeant Gilot were at the lot five-to-ten minutes before Lieutenant O'Keeffe arrived. Respondent admitted that while they were waiting, she was killing time by using her personal cell phone to go on Facebook. When Respondent heard the screeching tires of the lieutenant's arriving vehicle, she sensed that things were "going to go bad," and hit the "record" button on her phone. According to Respondent, Lieutenant O'Keeffe snatched open her car door and ordered the officers to stand at attention and put on their hats. Respondent described the lieutenant as "already worked up." Lieutenant O'Keeffe threatened to call the duty

captain, which she interpreted as an intention to suspend her. After their conversation, Respondent went back to the command, where she called IAB from the TS. Respondent insisted that she never refused to write summonses. (Tr. 164-68, 176-78)

Police Officer Cheryl Taylor testified that she and Respondent did not request the post change. During their shift, Officer Taylor [REDACTED], and told Sergeant Gilot that she needed a break and wanted to go on meal. Sergeant Gilot told them that Lieutenant O'Keeffe first wanted them to write five summonses each. Respondent and Officer Taylor, who at that point had written five or six summonses between them, both were unhappy about not getting their meal, and Respondent questioned Sergeant Gilot about it. (Tr. 125, 130, 137, 144-46)

At the lieutenant's direction, the officers went to meet him at the Walgreens parking lot. Officer Taylor testified that Lieutenant O'Keeffe drove his car into the lot at a "very rapid pace." The lieutenant then spoke with Respondent. According to Officer Taylor, "(Lieutenant O'Keeffe) was upset. He was screaming, he was yelling." Respondent, meanwhile, spoke with a normal volume and tone, did not get overly excited, and merely asked the lieutenant why he was so upset, angry, and aggressive. Afterward, Officer Taylor [REDACTED] [REDACTED] in part because she was upset with the way Lieutenant O'Keeffe had been yelling. (Tr. 132, 136, 140-41)

Respondent pleaded guilty to Specification 1, for wrongfully using her personal smartphone. Although the charge as written does not specify how she allegedly misused the phone, Respondent acknowledged both that she used her phone to check Facebook, and that she also used it to record her conversation with Lieutenant O'Keeffe.

Specification 2 alleges that Respondent was discourteous to Lieutenant O'Keeffe. The lieutenant testified that Respondent spoke to him in a disrespectful manner. At the end of their

conversation in the parking lot, Lieutenant O'Keeffe informed Respondent that she would be receiving a command discipline for discourtesy. Sergeant Gilot, who was standing in the immediate vicinity, testified that both the lieutenant and Respondent were loud, though oddly he claimed he could not hear the words spoken. Respondent and Officer Taylor, meanwhile, described Lieutenant O'Keeffe as being loud and aggressive, while Respondent spoke in a normal tone and voice. At issue is whether the credible evidence has established that Respondent was discourteous to the lieutenant during their exchange.

After listening to and observing the testimony of the witnesses, and reviewing the audio recording of the conversation in the parking lot, I find that Respondent was not discourteous to Lieutenant O'Keeffe. The encounter at Walgreens was set in motion when Sergeant Gilot informed the lieutenant that Respondent was intending to notify IAB and her trustee about not getting her meal. Lieutenant O'Keeffe instantly arranged a meeting with the officers, a couple of blocks from the stationhouse. It is evident that the lieutenant arrived in an already agitated state, as he repeatedly accused Respondent of refusing to write summonses, often without giving her a chance to reply. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Meanwhile, as heard in the recording, Respondent remained remarkably composed and non-confrontational, in contrast to the elevated volume and accusatory tone used by Lieutenant O'Keeffe. Despite being taken aback by the lieutenant's aggressive behavior, Respondent patiently explained that she never refused to write summonses. Indeed, Sergeant Gilot testified that Respondent did not refuse to write summonses, and that she had made clear to him that she would wait until the end of her tour to notify her trustee. The recording in evidence does not

support Lieutenant O'Keeffe's claim that Respondent was yelling loudly at him. Rather, it was only after their conversation had ended and the lieutenant ordered her back to the stationhouse to receive a command discipline for discourtesy that Respondent raised her voice; as they each returned to their vehicles, Respondent stated loudly that she was going to call IAB, which she did back at the command.

This tribunal is mindful of the need for discipline within the Department, and that it is important for officers to act courteously toward their supervisors. However, even in a paramilitary organization, not every disagreement with a supervisor amounts to misconduct. The words, tone, and context of the exchange must be evaluated. After listening carefully to the audio recording of the conversation, in conjunction with the testimony of the witnesses, I am not persuaded that Respondent was discourteous. Rather than taking a measured approach to his communication with Respondent, Lieutenant O'Keeffe was immediately confrontational; in contrast, Respondent maintained her composure and did not act disrespectfully toward the lieutenant. Under the specific circumstances of this case, the credible evidence has not established that Respondent was discourteous to Lieutenant O'Keeffe, and I find her not guilty of Specification 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on August 31, 1998. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. In 2007, Respondent negotiated a plea of thirty (30) suspension days previously served for, while off-duty, failing to identify herself and assist other members of service involved in dealing with an altercation.

The Department Advocate recommends a penalty of ten (10) vacation days. However, in light of the not guilty finding on the charge of discourtesy, that penalty recommendation is excessive. This tribunal is left with the task of fashioning a reasonable penalty for Respondent's wrongful use of her personal cell phone. As the Advocate noted, prior cases involving the wrongful use of one's personal phone normally have been handled as a command discipline, or also included other forms of misconduct which limits their value as precedent here.

To her credit, Respondent acknowledged that she wrongfully used her personal phone. While she was waiting for Lieutenant O'Keeffe to come to the parking lot, she used her phone to go on Facebook. Once the lieutenant arrived, she sensed there might be a confrontation and used the phone to record the interaction that followed. Taking into account the totality of the circumstances and issues in this matter, I recommend that Respondent forfeit three (3) vacation days.

Respectfully submitted,



Jeff S. Adler

Assistant Deputy Commissioner Trials

APPROVED

OCT 24 2018



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CHARMAINE MCCLAIN
TAX REGISTRY NO. 922738
DISCIPLINARY CASE NO. 2017-17973

Respondent was appointed to the Department on August 31, 1998. On her last three annual performance evaluations, she received a 3.5 overall rating of "Highly Competent/Competent" in 2016 and 4.0 ratings of "Highly Competent" in 2014 and 2015. She has been awarded one medal for Excellent Police Duty.

In 2007, Respondent pled Guilty to, while off-duty and at the scene of a fight, (i) failing to assist other members of service who were being pushed and shoved, (ii) failing to identify herself as a police officer, (iii) failing to request the response of a patrol supervisor to the scene of the incident, and (iv) failing to remain at the scene of the incident. For this misconduct, Respondent forfeited thirty (30) suspension days previously served without pay.

In connection with the instant charges and specifications, Respondent was placed on Level 2 Discipline Monitoring on July 13, 2018. Monitoring remains ongoing.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials